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No. 00-6677

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALABAMA IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Like *Williams* v. *Taylor*, 529 U.S. 362 (2000), this case involves the construction of the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") now codified at 28 U.S.C. § 2254(d)(1). The case presents two specific issues:

1. Whether the Texas Court of Criminal Appeals' holding that *Estelle* v. *Smith*, 451 U.S. 454 (1981), does not apply in the circumstances of this case (because the psychiatric examination at issue here was conducted two years *prior* to the offense and thirteen years prior to the pertinent capital murder trial) was "contrary to clearly established Federal law, as determined by [this] Court," or represents an "unreasonable application of[] clearly established Federal law" within the meaning of Section 2254(d)(1).

2. Whether the Texas Court of Criminal Appeals' holding that the instructions given to the jury in the sentencing phase of petitioner's trial, including the supplemental instruction given in response to *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), is "contrary to" any "clearly established Federal law" expressed in that decision, or represents an "unreasonable application" of that decision within the meaning of Section 2254(d)(1).

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae is a state in which the people, through their state legislature, have repeatedly authorized the death penalty for especially heinous crimes. This legislative decision has not been undertaken lightly. Rather, it is based on a firm conviction that capital punishment is the most effective way—perhaps the only way—to protect the state's citizenry from particularly predatory criminals. *Amicus* thus has a strong interest in ensuring that the Antiterrorism and Effective Death Penalty Act of 1996 is allowed to play the role that Congress envisioned, namely, preventing the federal courts, on habeas review, from interfering unduly with a state's efforts to perform this traditional "police power" function in the manner specified by the people's representatives.[1]

INTRODUCTION

Last Term, in *Williams* v. *Taylor*, 529 U.S. 362 (2000), and *(Michael) Williams* v. *Taylor*, 529 U.S. 420 (2000), this Court began the important work of clarifying for the lower federal courts the limits on federal habeas court review of state-court decisions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This case provides an opportunity to continue that effort. Here, the Court can make clear the limited circumstances in which a state-court decision can be considered, for purposes of AEDPA, "contrary to" or an "unreasonable application of" a clearly established principle of federal law articulated in a decision of this Court.

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[1] As a state, Alabama is not required to seek leave to file an *amicus curiae* brief. *See* Sup. Ct. R. 37.4. The undersigned counsel alone have authored this brief, and no person or entity other than *amicus* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

As the Court has unanimously recognized, in enacting AEDPA "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 386 (opinion of STEVENS, J.); *id.* at 404 (O'CONNOR, J., for majority). Indeed, the legislative history indicates that the statute's habeas provisions were enacted specifically to curb the prior "abuse of the statutory writ of habeas corpus, and to address the acute problem[] of unnecessary delay . . . in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944; see, *e.g.*, 142 Cong. Rec. S3463 (daily ed. Apr. 17, 1996) (Statement of Sen. Heflin) (AEDPA "contains strong provisions to reform Federal habeas corpus laws—something that is long overdue"). As one Senator put it,

> Finally, the charade of habeas corpus appeals will be reformed: death row inmates will no longer be allowed to drag out their appeals for several decades. I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have been violated, defendants retain very reasonable access to Federal courts to prove their innocence.

142 Cong. Rec. S3465 (statement of Sen. Warner). In signing the legislation, President Clinton endorsed this view of the problem the Act was meant to solve. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 720 (Apr. 24, 1996) ("For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.").

At the same time, Congress clearly recognized that the prior abuse of the writ by some federal courts was detrimental, not only to sound criminal-justice policy, but also to the proper relationship between the federal government and the states. See, *e.g.*, 142 Cong. Rec. S3465 (statement of Sen. Warner) ("I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have

been violated, defendants retain very reasonable access to Federal courts to prove their innocence."). Accordingly, AEDPA was "intended to advance" principles of "comity . . . and federalism" in addition to "finality." *(Michael) Williams*, 529 U.S. at 436.

The specific provision at issue here—28 U.S.C. § 2254(d)(1)—was crafted with these objectives in mind. As the majority noted in *Williams*, Congress viewed this provision "as an important means by which its goals for habeas reform would be achieved." 529 U.S. at 404 (O'CONNOR, J.). This section establishes that, for questions adjudicated on the merits in state court (such as the ones at issue here), federal habeas relief is available *only* if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). As the majority recognized in *Williams*, this provision thus "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." 529 U.S. at 412.

The *Williams* Court also clarified the scope of AEDPA by defining the key terms in Section 2254(d)(1). Specifically, the Court determined that a state court decision is "contrary to" clearly established Supreme Court precedent only if the state court "applies a rule that contradicts the governing law set forth in [this Court's] cases" or "decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 405, 413. The Court also opined that a state court's decision involves an "unreasonable application" of federal law if the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The Court emphasized that, under this provision, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-

court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

The Court did not, however, indicate how it would determine whether the facts of a case are "materially" distinguishable from the facts in a decision of this Court. Nor did the Court reach a holding as to whether an "unreasonable application" of a Supreme Court precedent can be established on the basis of a refusal to extend such a precedent to a new context or, if so, "how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Id.* at 408-09. Not surprisingly, the petitioner in this case attempts to establish (if only implicitly) that his claims fit neatly into both of these supposed "exceptions" to Section 2254(d)(1).

This case thus provides an opportunity for the Court to address these two unresolved issues. For reasons explained in detail below, this Court should hold, first, that the facts of a case cannot be considered "materially indistinguishable" from a prior decision of this Court where facts that this Court treated as *significant* in the first case are not present in the subsequent case. This principle should apply even if those facts were not identified as dispositive and, indeed, arguably were not dispositive of the outcome in the prior case.

Second, the Court should hold that a state court's failure to extend to a new context a principle that, by its terms or its logic, is limited to a different context cannot be considered an "unreasonable application" of that principle. This approach should apply, moreover, even if the principle articulated by this Court *could* reasonably be extended to the new context.

These two holdings, which fully dispose of petitioner's claims here, are compelled by AEDPA's language and structure. They are consistent with this Court's earlier pronouncements. And they are necessary to ensure that AEDPA serves its proper role of protecting state criminal-justice systems from over-reaching by lower federal courts.

STATEMENT OF FACTS

To avoid burdening the Court with yet another recitation of the facts pertinent to this case, *amicus* adopt the statement of facts presented in the respondent's brief.

ARGUMENT

The remainder of this brief explains why this case does not fall within the class of cases identified by 28 U.S.C. § 2254(d)(1) for which federal habeas relief is available. This is so notwithstanding petitioner's arguments that the decision of the Texas Court of Criminal Appeals affirming his sentence was both "contrary to" and an "unreasonable application of" this Court's decisions in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Estelle* v. *Smith*, 451 U.S. 454 (1981). Because the issues raised by petitioner's *Estelle* claim are of more general application than those raised by his *Penry I* claim, *amicus* will address the *Estelle* claim first.

I. THE TEXAS COURTS' DETERMINATION THAT NO FIFTH AMENDMENT VIOLATION OCCURRED AS A RESULT OF THE ADMISSION, AS REBUTTAL EVIDENCE, OF A PSYCHIATRIC EVALUATION FROM AN UNRELATED CRIMINAL PROSECUTION, DOES NOT WARRANT HABEAS RELIEF UNDER AEDPA.

Petitioner's *Estelle* claim involves a psychiatric report requested by Penry's own defense counsel in an earlier case, regarding a separate crime, and admitted as rebuttal testimony in the punishment phase of Penry's capital trial. In 1977—two years before he raped and killed Pamela Carpenter and thirteen years before the capital murder trial at issue here—Penry underwent a psychiatric examination with Dr. Felix Peebles regarding an unrelated aggravated rape charge. See *Penry* v. *Texas*, 903 S.W.2d 715, 759 (Tex.

Crim. App. 1995). Penry's defense counsel in that case requested the examination. *Id.* Among other things, Dr. Peebles's report "determined that Penry would be dangerous in the future if released." *Penry* v. *Johnson*, 215 F.3d 504, 511 (5th Cir. 2000). Given that it occurred some two years before Carpenter's rape and murder, Dr. Peebles's report contained no testimony from Penry concerning the crime at issue here.

During the punishment phase of Penry's second trial, his counsel introduced testimony about his psychological state. In rebuttal, the State presented the testimony of two psychiatrists who, among other documents, considered Dr. Peebles's 1977 report. Dr. Peebles's report also was admitted into evidence.

On direct review, the Texas Court of Criminal Appeals ultimately determined that the admission of this evidence did not violate the Fifth Amendment under the reasoning of *Estelle*. That is because, at the time Penry made his statement to Dr. Peebles—*i.e.*, during an earlier, unrelated, defense-requested examination—he was not being confronted by an agent of the state. *Penry*, 903 S.W.2d at 759-60 (citing *Estelle*).

Petitioner asserts that the Texas decision is contrary to *Estelle* and falls within Section 2254(d)(1) because the facts of the cases are "materially indistinguishable" and yet Texas reached a different result. Pet. Br. at 13-14; see *Williams*, 529 U.S. at 406. In the alternative, petitioner asserts that the Texas decision is an "unreasonable application" of *Estelle* to the facts of petitioner's case. Pet. Br. at 14; see *Williams*, 529 U.S. at 407-12. As shown below, both claims must fail.

A. The Texas Courts' Decision Cannot Be "Contrary To" *Estelle* v. *Smith* Under A Proper Standard Of Materiality.

The first prong of the AEDPA inquiry requires a federal court to consider whether the state court's decision was

"contrary to" clearly established Supreme Court precedent. In *Williams*, the Court observed that, under the "contrary to" clause of § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court "decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413. Without further elaboration, this language threatens to invite, through the back door, the very sort of unfettered, intrusive review of state-court decisions that Congress intended to curtail when it enacted AEDPA. That is because this formulation would seem to leave lower federal courts free to determine *de novo* which factual differences are "material" and which are not.

This risk can be eliminated if this Court adopts an appropriately narrow standard for materiality, namely, whether this Court itself treated as significant in the earlier case a fact that is missing from (or different in) the case at issue. Under this standard, as shown below, the facts pertaining to petitioner's *Estelle* claim are easily distinguished from the facts of *Estelle* itself.

1. The Facts Of Two Cases Should Not Be Considered "Materially Indistinguishable" Where Facts That This Court Treated As Significant In The First Case Are Not Present In The Subsequent Case.

The importance of establishing a standard for materiality can be seen from a simple example. Suppose this Court issues a decision in which, in the course of its analysis (not just in the description of the factual background), it treats four specific facts as having some bearing on the ultimate result (*e.g.*, excluding a particular piece of evidence or finding jury instructions inadequate). Suppose further that the Court does not specify (as it generally does not) which of the various possible subsets of those four facts would be either necessary or sufficient to justify that result.

Now suppose that, in a subsequent habeas case, two of those facts are present, but two are not. If on direct review the state court reaches a result "different" from the result reached by this Court (*i.e.*, not excluding a piece of evidence or finding a jury instruction adequate), the question under *Williams* will of course be whether the absence of the two "missing" facts creates a "material distinction" with this Court's earlier decision.

The problem, of course, is that a federal habeas court's view of whether these distinctions are "material" is likely to be influenced by that court's view of the merits of the underlying issue. If the habeas court agrees with the state court's analysis of the merits, it will likely agree that the distinctions between the case at issue and this Court's earlier decision are material. But if the federal court disagrees with the state court's decision as a *de novo* matter (*i.e.*, it believes the evidence should have been excluded or the jury instruction was inadequate), it likely will believe that the distinctions between the two cases are *not* "material." Thus, if the federal court simply thinks the state court reached the wrong result under this Court's precedent, and if the federal court is allowed an unfettered hand to determine for itself which distinctions are "material," it will usually have little difficulty finding that the state-court decision is "contrary to" the pertinent decision of this Court. Cf., *e.g.*, *United States* v. *Alfaro*, 919 F.2d 962, 964-65 (5th Cir. 1990) (rejecting a "materially untrue" standard because it was "not . . . very helpful" and "confusing"); *Helene Curtis* v. *National Wholesale Liquidators, Inc.* 890 F. Supp. 152, 158 (E.D.N.Y. 1995) ("Materiality is, by its very nature, a subjective concept that is difficult to define."). In that circumstance, moreover, AEDPA's "contrary to" prong is likely to be invoked, routinely, in what are properly viewed as—in the words of Justice O'Connor's opinion in *Williams*—"run-of-the-mill" cases. 529 U.S. at 406.

The solution to this problem is to adopt a standard of "materiality" that leaves somewhat less room for judgment on the part of the federal habeas court, and is therefore less likely to be influenced by the federal court's views of the underlying merits. Such a standard, moreover, is readily available and generally straightforward in its application: The habeas court can simply identify the facts that this Court identified as significant to its decision (including the absence of certain facts). Or, as the Fourth Circuit put it in *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998) (the decision analyzed at length in *Williams*) the habeas court can look to the facts "on the basis of which the precedent was decided." If any of those facts is not present in the subsequent case, that case cannot be said to be "materially indistinguishable" from the earlier decision of this Court. In other words, this Court's prior decision should be allowed to speak for itself, without further interpretation by a federal habeas court.

By affording greater deference to state-court decisions, this approach obviously promotes the values of "comity ... and federalism" that this Court has said underlie AEDPA. *(Michael) Williams*, 529 U.S. at 436. It also reduces the risk that the "contrary to" prong of AEDPA will be routinely invoked to overturn "run-of-the-mill" state-court decisions.

Most important, this approach is far more consistent with AEDPA's language than an approach that allows federal habeas courts a free hand to make determinations about whether the facts in the case before them are "materially indistinguishable" from the facts in a prior decision by this Court. The statutory requirement that a state-court decision be "contrary to . . . clearly established Federal law, as determined by" a decision of this Court, suggests a measure of "deference" to state courts in interpreting and applying the decisions of this Court.[2] And if a federal habeas court has to

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[2] Indeed, the Conference Committee explained that the statute "requires deference to the determinations of state courts that are neither 'contrary

explain why the absence of certain facts that this Court treated as significant to its prior decision is not enough to create a "material" distinction, that by itself will strongly suggest that the state-court decision is not, in fact, "contrary to . . . *clearly* established" federal law.

2. Numerous Facts That This Court Treated As Significant In *Estelle* Are Not Present Here.

With respect to petitioner's *Estelle* claim, this case presents an even stronger situation than the hypothetical example discussed above. *None* of the facts that the Court treated as significant in *Estelle* is present in this case.

First, in *Estelle*, it was the trial court that "informally ordered the state's attorney to arrange a psychiatric examination" to determine the defendant's competency to stand trial. 451 U.S. at 456. This was done "even though defense counsel had not put into issue [defendant's] competency to stand trial or his sanity at the time of the offense." *Id.* at 457 n.1. Moreover, defense counsel apparently did not even discover that this psychiatric examination had occurred until after jury selection began. *Id.* at 458 n.5.

Here, by contrast, petitioner's own defense counsel requested the examination in advance of the petitioner's trial.

Second, in *Estelle*, the psychiatric examination was conducted with regard to the crime at issue and involved details of that crime. Indeed, the psychiatrist "drew his conclusions largely from [defendant's] account of the crime during their interview." *Id.* at 464. Hence, as this Court later observed, the defendant's "communications to the psychiatrist during the examination had become testimonial in nature." *Buchanan* v. *Kentucky*, 483 U.S. 402, 421 (1987).

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to,' nor an 'unreasonable application of,' clearly established federal law." H.R. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. at 944.

Here, by contrast, petitioner was examined by Dr. Peebles about an entirely separate crime, some two years before he murdered Pamela Carpenter (thereby, ironically, fulfilling Dr. Peebles' prediction of petitioner's future dangerousness). Accordingly, none of Dr. Peebles's conclusions could possibly be based on petitioner's unwitting "testimony" about the instant capital murder case.

Third, *Estelle* involved a significant curtailment of the defendant's freedom and a significant opportunity for the state to dominate the defendant's will. The defendant "was in custody [in jail] when the examination was ordered and when it was conducted," upon the order of the court and with the facilitation of the state's attorney. *Estelle*, 451 U.S. at 467. And defense counsel was not even timely informed about the examination, let alone given an opportunity to consent to it.

Here, by contrast, the psychiatric report resulted from a defense-requested psychiatric examination in an entirely separate case, occurring some two years before the instant crime and some thirteen years before the instant trial. Moreover, there is no indication from the record that the concerns underlying custodial interrogations present in *Estelle* were remotely present for petitioner.

Fourth, in *Estelle*, the defendant introduced no psychiatric evidence, nor had he indicated that he might do so. Rather, the state offered information obtained from the court-ordered competency examination "as affirmative evidence to persuade the jury to return a sentence of guilt." *Id.* at 466.

Here, by contrast, petitioner himself raised the issue of, and introduced testimony about, his psychological state. Dr. Peebles's report came in not as affirmative evidence, but as rebuttal to issues petitioner himself chose to raise.

Accordingly, in every respect that this Court saw fit to mention in *Estelle*, the facts in petitioner's case are readily and materially distinguishable.

B. Texas's Decision Was Not An "Unreasonable Application" Of *Estelle*.

Petitioner also claims, in the alternative, that the Texas courts' application of *Estelle* was "unreasonable." Given the significant distinctions between this case and that one, this argument can only mean that, in petitioners' view, the Texas courts acted unreasonably in refusing the extend the principle articulated in *Estelle* to the very different circumstances of this case.

This argument thus raises the critical issue that was left open in *Williams*, *i.e.*, what standard should be applied in determining whether a state court's decision not to extend a Supreme Court decision to a different factual setting can be deemed "unreasonable." As shown below, such a decision should not be deemed unreasonable when the principle articulated by this Court is, by its own terms or its underlying logic, designed to apply in a different set of circumstances—even if this Court might later conclude (outside of the AEDPA habeas context) that the principle should apply in the new context as well. As shown below, application of this principle squarely forecloses petitioner's "unreasonable application" claim.

1. A State Court's Failure To Extend To A New Context A Principle That By Its Terms Or Its Logic Is Limited To A Different Context Cannot Be Considered An "Unreasonable Application" Of That Principle.

In *Williams*, this Court did not have occasion to develop fully a standard for determining when a state court's extension of (or refusal to extend) this Court's precedent would be considered "unreasonable." 529 U.S. at 408. At the outer limit, the Court stated that it would not go so far as to require that a state court apply federal law "'in a matter that reasonable jurists would *all* agree is unreasonable'" to be considered "unreasonable." *Id.* at 409 (quoting *Green*, 143

F.3d at 870) (emphasis added). Rather, the proper inquiry is "whether that state court's application of clearly established federal law was objectively unreasonable." *Id.*

The Court also cautioned that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law," and characterized this as "the most important point" to remember when applying AEDPA. *Id.* at 410. Under AEDPA, habeas relief is not available simply because a federal habeas court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. "Rather, that application must also be unreasonable." *Id.* Splits of authority among the lower courts are common and do not indicate that either side has been objectively unreasonable, even if this Court ultimately decides that only one position is correct.

The Court left open, however, the question of exactly how "'extension of legal principle' cases should be treated" under AEDPA. *Id.* at 409. *Amicus* believes the Court should adopt the following standard: a state court decision declining to extend to a new context a principle from this Court's precedent is objectively reasonable if that precedent, by its terms or its clear logic, is designed for or limited to a different context. This should be the case, moreover, even if the habeas court believes the Supreme Court precedent *should*, as a *de novo* matter, apply to the new context.[3] Such a standard is warranted for at least three reasons.

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[3] Thus, to determine whether a failure to extend this Court's precedent is unreasonable, the proper inquiry would be: what do the terms and logic of this Court's earlier decision *require*, given the differing facts at issue in the instant case? Obviously, if a case falls squarely within the holding of a prior Supreme Court decision, it would be unreasonable to refuse to extend that decision to the new case. But there may also be situations in which a new case, although not falling squarely within the holding of any prior Supreme Court decision, is unambiguously controlled by the logic of a prior decision or combination of decisions. In that unusual

First, such a rule is necessary to respect the distinction noted in *Williams* between "unreasonable" applications of federal law and those applications that are merely "incorrect." If a state court's refusal to extend to a new context a principle that was developed for or limited to a different context could be said to be "unreasonable," it is hard to imagine any such decisions that would fall into the "merely incorrect" category.

Second, such a rule is also necessary to give effect to the congressional judgment that Section 2254(d)(1) requires some amount of "deference" to state-court interpretations of this Court's decisions. H.R. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. at 944. If a federal habeas court may treat as "unreasonable" a state court's decision not to extend a principle articulated by this Court to a context for which it was not designed or intended, it is hard to imagine how a federal court could ever find room for deference to the state court's interpretation.

Third, and more generally, the standard suggested here will help to ensure that AEDPA fulfills its purpose of promoting what this Court called the values of "comity . . . and federalism." *(Michael) Williams*, 529 U.S. at 436. As the Court noted, those values require a sense of "mutual respect and common purpose . . . between the States and the federal courts." *Id.* And, as Congress recognized in passing AEDPA, this sense of "mutual respect" requires that federal authorities be "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.*

Consistent with these bedrock principles, unless the terms or logic of this Court's precedent compels (or forbids) its extension to another context, it cannot be "unreasonable" within the meaning of AEDPA for a state court to hold that

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circumstance, a failure to follow that logic could also be deemed unreasonable.

such an extension (or refusal) is unwarranted. While this Court may at some point have occasion to address directly the underlying question on the merits, and may then decide for itself whether to extend the existing precedent to the new context, the AEDPA context is not the proper place to correct a mere difference of opinion.

2. By Its Terms And Its Logic, The Exclusionary Principle Articulated In *Estelle* Is Limited To Situations In Which The Defendant Neither Initiates Nor Introduces Psychiatric Evidence.

Under this standard, petitioner's *Estelle* claim cannot satisfy the demands of AEDPA. The terms and logic of *Estelle* expressly limit its holding to the "distinct circumstances" of that case: "A criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 466, 468 (emphasis added). Accordingly, this Court made expressly clear that its holding turned in part on the *absence* of two factual circumstances: a criminal defendant initiating a psychiatric evaluation or introducing psychiatric evidence.

Petitioner's case presents *both* of the factors this Court found notably absent in *Estelle*: (i) petitioner and his counsel initiated the examination (and in an earlier, entirely separate matter) *and* (ii) petitioner put his psychiatric condition at issue in the instant trial and introduced psychiatric evidence. Accordingly, by the terms and logic of *Estelle*'s holding, it is objectively reasonable for the Texas courts to have declined to extend *Estelle* to the very context that the Court expressly distinguished in its opinion.

This is not, of course, to suggest that this Court cannot fully revisit issues it has reserved in one case and decide them in the opposite way upon full consideration in a subsequent case. But where this Court's most relevant precedent expressly

distinguishes certain factual circumstances, it cannot be unreasonable for a state court to hold that where those distinguished circumstances exist, the Court's rule should not be extended.

Petitioner's citation to some lower court cases and a dissent from this Court (to the effect that a defense counsel's initiation of the psychiatric examination does not remove Fifth Amendment concerns) does not render Texas's decision to the contrary "unreasonable" under AEDPA. See Pet. Br. at 35-38; cf. *Williams*, 529 U.S. at 412 (holding that AEDPA "restricts the source of clearly established law to this court's jurisprudence"). Even assuming *arguendo* that every lower court to consider similar facts had gone against Texas, and even if this Court, if considering the matter in a non-AEDPA context, might decide against Texas's conclusion, that alone does not mean that Texas's determination is "unreasonable."

To be sure, the presence of that authority might be useful to help buttress a state court in taking the *contrary* view to Texas's and concluding that, *despite Estelle*'s terms and logic, it was reasonable to extend that decision to a circumstance expressly distinguished by *Estelle*. But the existence of these decisions does not establish that Texas's decision not to extend *Estelle* to this context was unreasonable.[4]

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[4] Even if this Court were to adopt a less deferential standard, the Texas courts' decision is still objectively reasonable. First, this Court has expressly declined to extend *Estelle* to situations in which a defendant places his psychological state at issue and the examination is introduced as rebuttal evidence. *Buchanan* v. *Kentucky*, 483 U.S. 402, 423 (1987). Where, as here, the defendant placed his mental status in issue, this Court found no Fifth Amendment violation in the state presenting rebuttal evidence in the form of "excerpts" from a psychiatric examination where the report did not "describe[] any statements by [the defendant] detailing with the crimes for which he was charged." *Id.* at 423.

Second, petitioner has failed to show any violation of the bedrock principle underlying the Fifth Amendment, that is, that the state must produce evidence against a defendant "'by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his lips.'" *Estelle*, 451 U.S. at 462 (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581-82 (1961)). Here, because petitioner's own attorney requested Dr. Peebles' evaluation, Dr. Peebles was not an agent of the state, and the state did nothing to "force" any information from petitioner.

Third, excluding the psychiatric evaluation in circumstances such as these would not serve the deterrence goal that underlies the exclusionary rule. As the Fifth Circuit succinctly explained, at the time Dr. Peebles examined him, "Penry was not yet in custody on the instant capital charge and, thus, could not have been warned about the potential use of his statements at the punishment phase of the capital trial." *Penry* v. *Johnson*, 215 F.3d 504, 511 (5th Cir. 2000). Accordingly, excluding that evaluation would be a pure windfall to petitioner; it would not deter unconstitutional conduct by other state actors.

II. THE TEXAS COURTS' ANALYSIS OF THE JURY INSTRUCTIONS, INCLUDING THE SUPPLEMENTAL INSTRUCTION, DOES NOT WARRANT HABEAS RELIEF UNDER AEDPA.

Petitioners' remaining claim is based on this Court's 1989 decision vacating his first death sentence. There, the Court determined that, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," a death sentence was improper. *Penry I*, 492 U.S. at 308.

In 1990, after retrial before a separate jury, petitioner was again convicted of capital murder and sentenced to death. This time, however, the judge gave a supplemental instruction that explicitly instructed the jury that it must "give effect and consideration" to "any mitigating circumstances" including "any aspect of the defendant's character and record." See *Penry*, 215 F.3d at 508 (quoting the trial court's instruction). The jury was further instructed that, if it determined that a life sentence was appropriate, it should give a negative finding to one of the three Special Issues presented to it. *Id.*

Petitioner challenges these instructions as inadequate under *Penry I*. Once again, he argues that this claim falls within the category of habeas claims cognizable by the federal courts under Section 2254(d)(1) because, according to petitioner, the Texas Court of Criminal Appeals' decision was both "contrary to" and an "unreasonable application of" *Penry I*. And once again, neither of these arguments has merit.

A. The Texas Courts' Analysis Is Not "Contrary To" This Court's Decision In *Penry I* Because This Case Lacks At Least Two Of The Facts That This Court Found Significant There.

As with his *Estelle* claim, petitioner contends that the Texas courts' analysis of the jury instructions in this case is "contrary to" *Penry I* because, in his view, the facts of the two cases are "materially indistinguishable." Pet. Br. at 13-14. Under the standard articulated above, however, this is incorrect because two critical facts that were absent in *Penry I* are present here.

First and foremost, the trial court in this case gave a supplemental instruction that was *not* given in *Penry I*, and that clearly allowed the jury to consider all of the mitigating evidence petitioner wished to present. Whether or not another court might deem this instruction adequate to cure the problem identified in *Penry I* (a subject addressed below), there is no doubt that such an instruction was not given in *Penry I*, and that this Court specifically pointed to the absence of such an instruction in its opinion. 492 U.S. at 328.

Second, during Penry's second trial, his defense counsel, *without* objection from either the court or the prosecution, stated the following during closing argument:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.

JA 3:640.

The prosecution during petitioner's second trial did not attempt to contradict this statement by petitioner's counsel—a statement that encouraged the jury to treat the supplemental instruction as a kind of "nullification" instruction. *Penry*, 903 S.W.2d at 765. By contrast, in *Penry I*, the prosecution *did* contradict a similar plea when petitioner's counsel made it during his first trial. This Court, moreover, expressly cited that prosecution action in holding that the instructions given during the first trial were inadequate. 492 U.S. at 326.

Whether or not this Court would find these distinctions dispositive if the Court were reviewing the matter *de novo*, there is no doubt that these two facts are "material" in the sense described above. That is, the Court itself treated them as significant (if not dispositive) to the analysis in *Penry I*. This case therefore cannot be considered "materially indistinguishable" from *Penry I*.

B. The Texas Courts' Analysis Is Not An "Unreasonable Application" Of *Penry I*.

Petitioner is also incorrect in contending that the Texas courts "unreasonably applied" *Penry I* to this case. First, contrary to petitioners' suggestions, *Penry I* made no attempt to define the language of a proper instruction, much less to hold that Texas's three Special Issues were invalid regardless of the supplemental instructions that might be given along with them. Second, especially when combined with the unrebutted explanation by petitioner's own counsel, the trial court's supplemental instruction, while perhaps not perfect in every detail, gave the petitioner an adequate opportunity to

have the jury consider his mitigating evidence. Each of these points is elaborated below.

1. *Penry I* Established The Need For A Supplemental Instruction, But Did Not Attempt To Define The Precise Language Of That Instruction.

In *Penry I* the Court did not specify a single, exclusive remedy for the defect it identified. To be sure, the Court's opinion can reasonably be read to suggest that a supplemental instruction on the word "deliberately" in the First Special issue might address some of the concerns raised by the Court. See 492 U.S. at 323. But the opinion did not suggest that such a definition was a necessary or sufficient component of an appropriate supplemental instruction. Thus, the only thing "clearly established" by *Penry I* was the defect—not the remedy.

Certainly, to comply with *Penry I*, the trial court *might* have attempted to define the terms of the Special Issues so as to encompass mitigating evidence of mental retardation and an abused childhood. However, as this Court's careful analysis of the Special Issues in *Penry I* makes clear, the language of the Special Issues does not fully encompass all of the mitigating evidence offered by petitioner. See *id.* at 322-25. And it is doubtful that this language could be defined in a way that would clarify, rather than cloud, the jury's ability to consider and give effect to such evidence. For example, while "deliberately" might be defined to include mental retardation, the inclusion of evidence that the defendant was abused as a child would arguably stretch the definition of the term beyond what it can reasonably bear.

Rather than defining specific terms in a way that might only add to jury confusion, the trial court elected to make explicit the jury's obligation to consider mitigating evidence. To be sure, this may not be a perfect reconciliation of the Texas statutory scheme and the principles established in *Penry I* and

other decisions of this Court such as *Graham* v. *Collins*, 506 U.S. 461 (1993), and *Johnson* v. *Texas*, 509 U.S. 350 (1993)—which is likely an impossible task. But the trial court's effort is certainly a reasonable one, and one that is entitled to deference under the narrow standard of review for habeas petitions established by Congress under AEDPA.

The reasonableness of the state courts' approach is confirmed by petitioner's own argument. A central premise of that argument is that *Penry I* required the trial court to abandon the Special Issues framework altogether. See Pet. Br. at 19 (stating that the trial court erred because it "did not liberate the jury from the confining effect of the three 'special issues'"); see also Brief of American Association of Mental Retardation ("AAMR") *et al.* at 11 ("[T]he trial judge could easily have added a fourth special issue question on mitigation . . . ."). In other words, petitioner and the *amici* AAMR *et al.* argue that the only way the trial court could have remedied the defect identified in *Penry I* was either to ignore or to rewrite the statute completely—a step that the trial court was not at liberty to take.[5]

2. The Supplemental Instruction Adequately Permitted The Jury To Consider And Give Effect To Petitioner's Mitigating Evidence.

The trial court's supplemental instruction, moreover, addressed the Court's concerns in the most direct way possible. In *Penry I*, "[t]he jury was never instructed that it

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[5] The remedy proposed by petitioner was specifically rejected by this Court in *Graham* v. *Collins*, 506 U.S. 461, 476 (1993) (rejecting the notion that the Texas statute must be read to "require in all cases that a fourth 'special issue' be put to the jury"); *see also Johnson* v. *Texas*, 509 U.S. 350, 373 (1993) ("To rule in Petitioner's favor, we should have to require that a jury be instructed in a manner that leaves it free to depart from the special issues in every case. This would, of course, remove all power on the part of the States to structure the consideration of mitigating evidence—a result we have been consistent in rejecting.").

could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U.S. at 320. By contrast in this case, the jury *was* instructed to "decide how much weight" the mitigating evidence deserved and to "give effect and consideration to them in assessing the defendant's personal culpability." *Penry*, 215 F.3d at 508 (quoting trial court's instruction). It was also told, in essence, that if it believed that those mitigating circumstances justified a life sentence rather than a death sentence, it should issue a negative finding as "to one of the special issues." *Id.*

The approach taken by the trial court is consistent with other decisions of this Court. For example, in *Buchanan* v. *Angelone*, 522 U.S. 269 (1998), this Court approved a jury instruction because it "afforded jurors an opportunity to consider mitigating evidence." 522 U.S. at 277. In *Weeks* v. *Angelone*, the jury received "an explicit direction to consider mitigating evidence." 528 U.S. 225, 233 (2000). Precisely the same sort of instruction was given here:

> [Y]ou are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.

Penry, 215 F.3d at 508.

The approach taken by the trial court also typifies the approach of numerous Texas courts in the wake of *Penry I*. Indeed, the instruction here was based on similar instructions in earlier cases dealing with death sentence challenges that invoked *Penry I*. See, *e.g.*, *Coleman* v. *State*, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); *Emery* v. *State*, 881 S.W.2d

702, 712 n.16 (Tex. Crim. App. 1994);[6] *Miller* v. *Johnson*, 200 F.3d 274, 289 (5th Cir. 2000) (reviewing a habeas petition in a case where a Texas trial court gave a very similar supplementary instruction).

The instructions given in these cases reflect the reasonable efforts of Texas courts to reconcile *Penry I* with the Texas death penalty scheme. Although the facial validity of the statute had been upheld in *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976), and again in *Franklin* v. *Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion), *Penry I* did not explain how a court could instruct a jury to give effect to its "reasoned moral response" (giving the jury discretion to consider a broad range of mitigating evidence) in the context of the Texas statute, which clearly narrowed the mitigating evidence that

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[6] The instruction given is also quoted in *Emery* v. *Johnson*, 139 F.3d 191, 200 (5th Cir. 1997), where the Fifth Circuit, on habeas review, concluded that the instruction comported with the requirements of *Penry I*.

Texas courts considering *Penry I* claims generally have separated cases into those that require a supplemental "*Penry* instruction" and those that do not. If the mitigating evidence relied on by the defendant falls within the scope of the special issues, then no additional instruction is required. *See, e.g.*, *Kemp* v. *State*, 846 S.W.2d 289, 310 (Tex. Crim. App. 1992) ("[A]ppellant was not entitled to a separate *Penry* instruction in order for the jury to give mitigating effect to the evidence he presented at trial."); *Jackson* v. *State*, 822 S.W.2d 18, 23 (Tex. Crim. App. 1990) (appellant's age is relevant to special issue No. 2 (future dangerousness) so no special instruction was necessary); *Ex parte Baldree*, 810 S.W.2d 213, 215 (Tex. Crim. App. 1991) (no additional instruction was necessary for the jury to consider and give effect to evidence of a drug problem, a suicide attempt, and lack of education). On the other hand, if the mitigating evidence does not fall within the scope of the special issues, a separate instruction is required. *See, e.g.*, *Rios* v. *State*, 846 S.W.2d 310, 316-17 (Tex. Crim. App. 1992) (additional instruction that directed the jury to consider all mitigating evidence but only insofar as it created a reasonable doubt as to one of the special issues was inadequate under *Penry I*); *Gribble* v. *State*, 808 S.W.2d 65, 76 (Tex. Crim. App. 1990) (additional instruction should have been given where the defendant offered evidence of a troubled childhood including possible sexual abuse).

the jury could consider to several specific categories. See, *e.g.*, *Trevino* v. *State*, 815 S.W.2d 592, 621 (Tex. Crim. App. 1991) (*en banc*) ("[T]he high Court [in *Penry I*] failed to inform this court how the jury is to give 'mitigating effect' to mitigating evidence that is not capable of being considered outside the special issues."). On its face, the statute simply provides no mechanism to accommodate all of mitigating evidence required by *Penry I*.

To be sure, as this Court and the Texas courts have recognized, the special issues inherently encompass a broad range of mitigating evidence. Thus, even without a supplemental instruction, petitioner's evidence of possible mental retardation has some bearing on the first Special Issue (which requires the jury to consider the "deliberateness" of the act) and the second Special Issue (which requires the jury to consider whether the defendant is likely to pose a continued threat to others).

But in this case, the trial court believed some of the mitigating evidence might not fit comfortably within the three Special Issues. And thus, whatever mitigating effect was left over was fully addressed by the supplemental instruction. Specifically, the jury was told to answer one of the Special Issues in the negative if it believed that the mitigating evidence presented by petitioner warranted a sentence less than death. *Penry*, 215 F.3d at 508. Whether this instruction is viewed as broadening the special issues to cover all of the mitigating evidence presented by petitioner, or as a type of "nullification instruction" (*i.e.*, effectively instructing the jury to disregard the statutory scheme if it finds the mitigating evidence compelling),[7] the instruction clearly corrects the

[7] Although "nullification instruction" may be a misnomer, Texas courts have adopted this term to describe supplemental instructions based on *Penry*. *See, e.g.*, *Coble* v. *State*, 871 S.W.2d 192, 207 (Tex. Crim. App. 1993) ("We have held that a jury nullification charge is sufficient to meet *Penry* requirements.") (citing *San Miguel* v. *State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993), and *Fuller* v. *State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)).

flaw identified in *Penry I*. Nor is there any "reasonable likelihood" that the jury was unable to understand or to apply the instruction. *Johnson*, 509 U.S. at 367.

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"This is a case about federalism." *Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991). That is because, at bottom, this case "concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Id*. The language and history of AEDPA make clear that such respect should be at its zenith when a federal habeas court determines whether a state-court decision is "contrary to" or an "unreasonable application of" a decision by this Court.

CONCLUSION

For these reasons, the decision of the Court of Appeals denying petitioner's motion for a Certificate of Appealability should be affirmed.

Respectfully submitted,

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